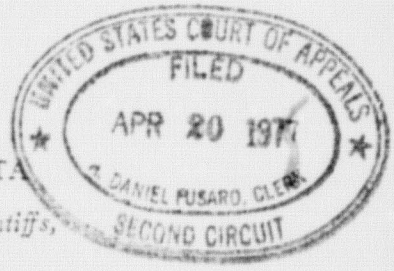
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7492

United States Court of Appeals
FOR THE SECOND CIRCUIT



DR. DAVID SIROTA, FRANCES NAISON, IDA SIROTA and JOHN P. LYCETTE, JR.,
Plaintiffs,

against

ECONO-CAR INTERNATIONAL, INC., WESTINGHOUSE ELECTRIC CORPORATION, JAMES W. CROWLEY, BERRIEN H. BECKS, and BERRIEN H. BECKS, WILLIAM FRANK O'ROURKE, and FLORIDA BANK AND TRUST COMPANY AT DAYTONA BEACH, as EXECUTORS OF THE ESTATE OF GUY B. ODUM,
Defendants.

JAMES W. CROWLEY and BERRIEN H. BECKS,
Third-Party Plaintiffs,

against

POWELL, GOLDSTEIN, FRAZER & MURPHY, a partnership,
Third-Party Defendant.

ABRAHAM & CO. INC.,
Claimant-Appellant,

against

SPINGARN & CO., INC., and SATNICK-JAPHA, INC.,
Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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UNITED STATES COURT OF APPEALS
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ABRAHAM & CO., INC.,

Claimant-Appellant,

- against -

SPINGARN & CO., INC., and SATNICK-JAPHA, INC.,

Claimants - Appellees.

- x

BRIEF ON BEHALF OF APPELLEES, SPINGARN & CO., INC. and SATNICK-JAPHA, INC.

Appellant, Abraham & Co., Inc., appeals from the decision of the District Court for the Southern District of New York upholding the claims of Appellees, Spingarn & Co., Inc. ("Spingarn") and Satnick-Japha, Inc. ("Satnick-Japha") (collectively, ("Appellees"), as owners of Interim Certificates of Westinghouse Electric Corporation ("Interim Certificates"), to participate in the Class Action Settlement Fund created by the Stipulation of Settlement dated March 31, 1975, ("Class Action Settlement") (A28-36) in this class action and denying the adverse claim of Abraham & Co., Inc. ("Appellant" or "Abraham") to participate in the Settlement Fund.

ISSUE PRESENTED

Whether the District Court erred in its decision, upholding the prior determination of Whitman & Ransom, Esqs. (A 96) that Spingarn and Satnick-Japha were the beneficial owners as of November 2, 1971 of certain Interim Certificates, and therefore are entitled to participate in the Class Action Settlement Fund.

STATEMENT OF THE CASE

A. Nature of the Case and Prior Proceedings

This appeal involves a dispute between adverse claimants to the Class Action Settlement Fund. The class action had been brought under the Securities Exchange Acts of 1934 on behalf of owners of Interim Certificates which represented certain

shares of Westinghouse Electric Corporation ("Westinghouse") that had been placed in escrow in connection with the merger of America, Inc. ("Americar") and Westcar, Inc. ("Westcar"), a subsidiary of Westinghouse. Pursuant to an Order and Judgment of the District Court, dated July 15, 1975 (A 44-49) the class was limited to those persons who owned Interim Certificates as of November 2, 1971 (A 47).

Appellees filed Proofs of Claim with Whitman & Ransom, Esqs., attorneys for Westinghouse, with respect to Interim Certificates purchased by them from Abraham on November 1, 1971. As required by the Class Action Settlement, they submitted the requisite Interim Certificates as proof of their ownership of the 1,212 shares.

Abraham also filed a Proof of Claim (A 91) with Whitman & Ransom with respect to the same 1,212 Interim Certificates (but did not submit the requisite Certificates). Its claim was rejected by Whitman & Ransom, who concluded that "Spingarn & Co., Inc. and Satnick-Japha Inc. were the beneficial owners as of November 2, 1971, and are the proper parties to assert the claim with respect to the subject 1,212 shares for which you (Abraham) are making claim." (A 94)

Abraham requested a hearing before the District Court to contest the rejection of its claim. The District Court held that Spingarn and Satnick-Japha had beneficial ownership of the shares on November 2, 1971 and upheld their claim. (A 96)

In his opinion, Judge Metzner summarized the established facts as follows: "On November 1, 1971, claimant Abraham & Co., (Abraham) authorized Brukenfeld, Mitchell & Co. (Brukenfeld) to sell 606 certificates. These were purchased on that date by claimant Satnick-Japha, Inc.(Satnick-Japha) and claimant Spingarn & Co., Inc. (Spingarn) which firms later that day sought to rescind the purchase agreement. Abraham thereafter sought arbitration to compel the completion of the sale and payment. By stipulation of settlement dated February 5, 1973, a settlement sales price was agreed upon, and the certificates were physically transferred to Satnick-Japha and Spingarn."[1]

Judge Metzner rejected Abraham's contention that the certificates were owned by it on November 2, 1971 because Satnick-Japha and Spingarn had refused to honor the contract for sale. The Court likewise rejected Abraham's argument that the stipulation of settlement of February 5, 1973 replaced any prior contract of sale between the parties, and that therefore Abraham remained the owner of the certificates until February 27, 1973, when the agreed transfer was consummated. The authorities relied on by Abraham in support of these contentions were distinguished by the Court.

Judge Metzner found, as had Whitman & Ransom, that Abraham sought to affirm the November 1, 1971 transaction and accordingly, on November 2, 1971, Abraham considered the agreement of the

---

1. The 606 shares on November 1, 1971, as referred to by the Court, were split subsequent to November 1, 1971 to constitute the 1212 shares in dispute.

parties a sale. Thus, Spingarn and Satnick-Japha were beneficial owners of the 1,212 Interim Certificates on November 2, 1971.

B. The Facts

In connection with the 1970 merger of Americar and Westcar, shares of Westinghouse stock were issued to Americar shareholders. A percentage of those shares were placed in escrow to indemnify Westinghouse against certain potential liabilities. Interim Certificates representing the escrowed shares were issued to Americar shareholders and were actively traded in the open market during the ensuing year. Spingarn, Satnick-Japha, Abraham and Brukenfeld, Mitchell & Co. ("Brukenfeld"), all stock brokerage firms, traded the Interim Certificates.

On October 29, 1971, two days before the deadline for claiming under the escrow agreement, Westinghouse announced that it was making a claim against the escrow account substantially in excess of the value of the escrowed shares.

On November 1, 1971, without knowledge of Westinghouse's claims against the escrow account, Spingarn and Satnick-Japha purchased 200 and 406 Interim Certificates respectively from Brukenfeld as undisclosed agent for Abraham (which became 400 and 812 shares respectively after the two for one split referred to above). At the same time, Satnick-Japha purchased an additional 387 Interim Certificates directly from Brukenfeld.[1]

---

1. Brukenfeld has made no claim for participation in the Settlement Fund with respect to those Interim Certificates which it sold for its own account on November 1, 1971 and Satnick-Japha has received its share of the Settlement Fund as the owner of those Interim Certificates on November 2, 1971.

Later that same morning, alleging that Abraham (and Brukenfeld) had known at the time of the sale of Westinghouse's claim against the escrowed shares but failed to disclose it to Spingarn and Satnick-Japha, Appellees sought to rescind their transactions and subsequently refused to accept delivery of the Interim Certificates purchased by them on November 1, 1971. Abraham refused to accept the attempted rescissions. On November 8, 1971, Brukenfeld's attorneys wrote to each Appellee advising it that "On November 1, 1971, that firm [Brukenfeld, acting as undisclosed agent for Abraham with respect to the Certificates here in dispute] concluded a sale to you of ... shares of Westinghouse Electric Interim Certificates .... Brukenfeld, Mitchell & Co. will deliver ... shares of Westinghouse Electric Interim Certicates to you today, the settlement date. We have advised Brukenfeld, Mitchell & Co. that you are required to accept this delivery and to make full payment of the agreed amount..." (Emphasis added) (A 81, A 82)

Abraham and Brukenfeld thereafter filed complaints against Spingarn and Satnick-Japha and commenced arbitration proceedings before the National Association of Securities Dealers Inc. ("NASD") to recover from Appellees the November 1, 1971 purchase price of the Interim Certificates.

Abraham's Statement of Claim filed with the NASD against Spingarn, (A 87) unequivocally asserted that the purchase occurred on November 1, 1971. Thus it stated:

"On November 1, 1971, for settlement

> November 9, 1971, Brukenfeld, Mitchell & Company, acting as agent, sold for the account of Abraham & Co., 200 Westinghouse Electric Interim Certificates in the over the counter market at a price of $65.00 per certificate. Spingarn & Co., Inc. purchased 200 such certificates...
>
> * * * *
>
> "It is Abraham's contention that Spingarn arbitrarily and capriciously breached its contractual commitment respecting its purchase of 200 Westinghouse Certificates in contravention of fundamental industry rules and standards of fair and honorable dealing." (Emphasis added).

Similarly, Abraham's complaint against Satnick-Japha, addressed to the Assistant Director of the NASD, alleged a November 1, 1971 sale:

> "On November 1, 1971 for settlement November 8, 1971, Brukenfeld, Mitchell & Co., acting as agent, sold for the account of Abraham & Co., 606 Westinghouse Electric Interim Certificates in the over the counter market at a price of $65.00 per certificate. Satnick-Japha purchased 406 such certificates." (Emphasis added).

In the ensuing Arbitration proceeding, Abraham sought to recover from Spingarn and Satnick-Japha $12,940.00 and $26,390.00 respectively - the full purchase price of the Interim Certificates.

By Stipulation of Settlement, dated February 5, 1973, ("Arbitration Settlement") (A 65), the NASD arbitration proceeding was settled. Pursuant to the Arbitration Settlement, Abraham delivered to Spingarn and Satnick-Japha 400 and 812 Interim Certifi-

cates respectively. Spingarn and Satnick-Japha in return paid Abraham the agreed sum of $6,260.92 and $12,739.08 respectively in settlement of the November 1, 1971 transactions. Concurrently, Appellees and Abraham exchanged General Releases.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN UPHOLDING THE CLAIMS OF APPELLEES, SPINGARN & CO., INC. AND SATNICK-JAPHA, INC., TO PARTICIPATE IN THE CLASS ACTION SETTLEMENT FUND

The decision of Judge Metzner that Spingarn & Co., Inc. and Satnick-Japha, Inc., were beneficial owners of the Interim Certificates in issue on November 2, 1971 should be affirmed for the following reasons:

(A) The date of the contracts between Appellees and Abraham for sale of the Interim Certificates was November 1, 1971, as affirmed by Abraham, and consummated pursuant to the Arbitration Settlement;

(B) Beneficial ownership of the Interim Certificates passed to Appellees on November 1, 1971.

(C) Spingarn and Satnick-Japha are members of the class entitled to participate in The Class Action Settlement Fund.

Chicago late in the day on Friday, Octo-

A. THE DATE OF THE CONTRACTS BETWEEN APPELLEES AND ABRAHAM FOR SALE OF INTERIM CERTIFICATES WAS NOVEMBER 1, 1971, AS AFFIRMED BY ABRAHAM AND CONSUMMATED PURSUANT TO THE ARBITRATION SETTLEMENT.

1. Abraham Affirmed the November 1, 1971 Contracts.

On November 1, 1971, Brukenfeld, as undisclosed agent for Abraham, offered Interim Certificates for sale to Spingarn and Satnick-Japha. Appellees accepted the offer and agreed to purchase the certificates. Later that day Spingarn and Satnick-Japha learned of the existence of Westinghouse's claim against the escrowed shares. Believing that Abraham had known of the claim at the time of the sale but had not disclosed it, Appellees attempted to rescind their respective transactions.

Abraham, however, refused to accept the attempted rescissions and reaffirmed the transactions. It maintained that the contracts for sale of November 1, 1971 remained in full force and effect and that Appellees were bound to accept delivery and pay for the purchased shares. Abraham accordingly commenced NASD arbitration proceedings against Appellees in order to collect the full purchase price under the November 1, 1971 sales. In so doing, Abraham necessarily affirmed the November 1, 1971 contract of sale in accordance with the rule of Section 1(b) of the NASD Uniform Practice Code, which provides:

> "In trades between members, failure to deliver the securities sold, or failure to pay for the securities as delivered, on or

> after the settlement date does not effect a cancellation of the contract. The remedy for the buyer or seller is provided by Sections 59 and 60 respectively unless the parties mutually consent to cancel the trade." (Emphasis added).

In its brief herein, Abraham urges that Section 1(b) applies only in the case of confirmed contracts. However, the language of Section 1(b) is unambiguous - failure of delivery or payment does not effect a cancellation of any contract unless the parties mutually consent to cancel the trade. Section 1(b) applies to all contracts of trade between members. It does not distinguish between confirmed contracts and D.K.'ed contracts.

Section 60 of the NASD Uniform Practice Code provides one of the remedies available to a seller when a buyer refuses to accept delivery, namely, that the seller may "sell out" for the account of the buyer and may charge the buyer's account with any difference between the contract price and the sell out price. Regardless of the availability of this remedy to Abraham, it chose not to pursue it.

Another remedy was also available to Abraham. It could have been relieved pursuant to Section 9 of the Uniform Practice Code of any further duty or liability on the transactions subsequent to Appellee's "D.K.'s" of the trades, but it did not elect to do so.

Abraham chose neither of these alternative remedies. Rather, Abraham elected to affirm both transactions of November 1, 1971 and sought payment of the purchase price. Section 8-107(2) of the Uniform Commercial Code so authorizes a seller, upon delivery of or tender pursuant to a contract of sale to recover the contract price from a purchaser who wrongfully fails to pay for the securities.

Williston on Contracts, 3d Ed. §1288 (1964), cogently summarizes these available remedies:

> "...when an author zed purchase of stock is made by the broker, and the customer defaults by refusing to accept and pay for the stock, the broker has an election of remedies. He may treat the stock as property of the customer, and sue for the full pruchase price upon a tender of the stock, or, he may sell the stock promptly or within a reasonable time, and recover the difference between the purchase price and the amount received in such sale." (Emphasis added)

The facts are clear. As prescribed by Section 1(b), Appellees' failure to pay for the shares on or after the settlement date did not effect a cancellation of the November 1, 1971 contracts for sale. Abraham specifically elected to affirm the contracts and undertook via arbitration to enforce them.

2. The Arbitration Settlement Enforced the November 1, 1971 Contracts.

Although Abraham now assumes a contrary and wholly untenable position, the intention of the parties in entering

the Stipulation of Settlement was clear. Appellees agreed to honor the November 1, 1971 transactions. Accordingly, pursuant to the Arbitration Settlement, Abraham was to deliver the subject Certificates and Appellees were to pay therefor an adjusted purchase price. The purchase price was reduced in settlement of Appellee's counterclaims against Abraham on the ground of fraud and in recognition of the parties' belief that on the date of sale, November 1, 1971, the shares had been rendered worthless.

The delivery of the shares under Arbitration Settlement can have no meaning unless it related to the November 1, 1971 transactions, which were the transactions that were being settled in the arbitration proceeding. Hence the delivery itself affirmed the November 1, 1971 transactions.

Admittedly, the parties never specifically discussed the date on which beneficial ownership of the shares was transferred. As noted by Judge Metzner in his decision below, "It is obvious that the question of who might participate in the settlement fund [i.e., in the class action] was never discussed in terms of the Arbitration Settlement, and that there was no intent common to the parties as to this subject represented by the February 5, 1973 stipulation." (A-96,98).

Nevertheless, the language of the Arbitration Settlement clearly demonstrates that the parties intended by its execution to consummate the November 1, 1971 sales and set forth the terms

pursuant to which those transactions were to be completed, to wit: the delivery of the certificates and payment of the purchase price. Thus, the Stipulation of Settlement provided:

> "1. Satnick-Japha Inc. (Satnick) shall pay to Abraham and Co., Inc. (corporate successor to Abraham & Co., a New York limited partnership) (Abraham) the sum of Twelve Thousand Seven Hundred Thirty-Nine Dollars and Eight Cents ($12,739.08) in full settlement of Abraham's claim in arbitration [to enforce the November 1, 1971 sales] against Satnick in the amount of Twenty Six Thousand Three Hundred Ninety Dollars and No Cents ($26,390) [the full purchase price of the shares] pending before the National Association of Securities Dealers, Inc. (NASD).
>
> "2. Spingarn & Co., Inc. (Spingarn) shall pay to Abraham the sum of Six Thousand Two Hundred Sixty Dollars and Ninety-Two Cents ($6,260.92) in full settlement of Abraham's claim in arbitration against Spingarn in the amount of Twelve Thousand Nine Hundred Forty Dollars and No Cents (12,940.00) [the full purchase price] pending before the NASD...
>
> [Paragraphs 3, 4 and 6 of the Stipulation provide for delivery of payment and mutual releases into escrow].
>
> "6. On or before Tuesday, February 6, 1973, Abraham will deliver to Wolf Haldenstein in escrow 1212 Westinghouse Electric Interim Certificates ("Certificates") owned by it (after a 2 for 1 split) and which are the subject of the claims agreed to be settled upon written entry of 'the award'..." (mphasis added).
>
> [The remainder of the Stipulation deals with the arbitrator's approval of its terms] (A-65)

The operative terms of the Arbitration Settlement provided that Appellees "shall pay" a specified purchase price and that Abraham "shall deliver" the shares - nothing more or less. Nowhere does the Stipulation state that 'Abraham agrees to sell 1212 Interim Certificates to Spingarn and Satnick-Japha'. Nowhere does the Arbitration Settlement state that the parties were entering a new transaction. Nowhere does it state that the November 1, 1971 sales were being cancelled and a new transaction being entered.

Paragraphs "1" and "2" of the Arbitration Settlement refer to payment by Satnick-Japha and Spingarn to Abraham "in full settlement of Abraham's claim in arbitration" against them. Abraham's claim in arbitration was for collection of the full purchase price based on the sale by Abraham and purchase by Satnick-Japha and Spingarn of Interim Certificates on November 1, 1971.

Abraham argues that the phrase "owned by it" in Paragraph 6 of the Arbitration Settlement was understood by it as an acknowledgment of its ownership of the Certificates in February, 1973. However, Abraham's emphasis on that phrase is misplaced. It was simply a descriptive phrase, intended to identify those securities as the ones which had been owned by Abraham - the ones which were on that date held by it and registered in its name.

Further, the word "owned" is in the past tense - indicating past ownership. Had the parties intended otherwise, they would have referred to shares "which Abraham now owns and is hereby selling to Spingarn and Satnick-Japha". The operative terms of the Arbitration Settlement are stated in the future tense - "will deliver" and "will pay" - whereas ownership of the shares by Abraham is referred to in the past tense, indicating all parties' understanding that Abraham no longer owned the shares after November 1, 1971.

3. The Date of the Contracts was November 1, 1971, According to Applicable Law

Abraham erroneously contends that the effect of the Arbitration Settlement was to extinguish the November 1, 1971 contract and substitute a new contract of sale. Judge Metzner rejected this contention because Abraham sought to affirm the sale as of November 1, 1971. Thus, he held:

> "...Abraham relies on Putnam v. Otsego Mutual Fire Insurance Company, 45 A.D. 2d 556, 360 N.Y.S. 331 (3d Dept. 1974), for the proposition that a compromise and settlement wipes out an underlying contract. That case is distinguishable from the case at bar. There, a party to a settlement tried to enforce a term of the underlying contract. There was no mention of the term in the settlement negotiations, and it was held not to apply to the settlement. Here, however, Spingarn and Satnick-Japha do not attempt to enforce a term of the contract, but simply to advert to a state of affairs that existed at a given date. Since Abraham sought to affirm the sale, Spingarn and Satnick-Japha had beneficial ownership of the shares on November 2, 1971, E.g., Tangorra v. Hagan Investing Corporation, 38 A.D. 2d 671, 327 N.Y.S.2d 131 (4th Dept. 1971)..."

Abraham's authorities in support of its position are inapposite. The facts and holdings of each cited case do not support Abraham's contentions, as none deals with the affirmance of a prior contract.

In Putnam v. Otsego Mutual Fire Insurance Company, 46 A.D. 2d 556, 360 N.Y.S.2d 331 (Third Dept. 1974) defendant agreed to pay a specified sum in settlement of plaintiff's claim under a fire insurance policy resulting from destruction of plaintiff's dairy barn by fire. Defendant insurer then refused to pay the agreed sum, seeking to enforce a specific clause of the original policy agreement and was denied the right to do so. In Gaffey v. St. Paul Fire and Marine Insurance Company, 221 N.Y. 113 (1917), plaintiff chose to accept insurer's offer to repair his insured truck in lieu of his contractual rights under the insurance policy. In Akieselskabet Dampskibsselskabet S. v. United States, 130 F. Supp. 363 (U.S. Ct. Cl., 1955) no prior contract between the parties existed. Moers v. Moers, 229 N.Y. 294 (1920) involved the construction of a contract settling all claims of a wife for support.

In In re Kellett Aircraft Corporation, 173 F.2d 689 (1949) (3d Cir., 1949), the Court dismissed a proof of claim based on a prior contract, where there had been an evident intent

to substitute a new agreement. Similarly, plaintiff and defendant specifically agreed to substitute a new contract for prior contracts for the purchase and sale of steel in Durasteel Co. v. Great Lakes Steel Corp., 205 F.2d 439 (8th Cir., 1953).

All the circumstances herein mandate a conclusion that the parties intended by their execution of the Arbitration Settlement to consummate the November 1, 1971 contracts of sale. Abraham claimed that there was a valid contract of sale with Claimants on November 1, 1971 and that it was entitled to enforcement of the contracts and recovery of the full purchase price.

As stated by Judge Metzner, "Since Abraham sought to affirm the sale, Spingarn and Satnick-Japha had beneficial ownership of the shares on November 2, 1971".

B. BENEFICIAL OWNERSHIP OF THE INTERIM CERTIFICATES PASSED TO APPELLEES ON NOVEMBER 1, 1971.

In any transaction for the sale of securities, the purchaser acquires rights of ownership in the purchased shares on the date of the contract of purchase and sale. For example, title to stock immediately vests in a purchaser when, pursuant to contract, a broker purchases stock for his customer. Markham v. Jaudon, 41 N.Y. 235 (1869); Baker v. Drake, 53 N.Y. 211 (1873).

The law is well settled that the economic burdens and benefits arising from the ownership of securities inure to the purchaser, as the beneficial owner thereof, as of the date a contract is entered into for the purchase and sale of securities.

On November 1, 1971, Abraham contracted with Appellees to sell the Westinghouse Interim Certificates here in issue. In commencing arbitration to enforce the sales, Abraham insisted that Appellees were beneficial owners of the Interim Certificates. It asserted that as purchasers on November 1, 1971, Appellees should bear the entire burden of the decline in value subsequent to November 1, 1971, and pay the full contract price for the purchased certificates.

A purchaser of shares, absent any agreement to the contrary, is entitled to all economic benefits from the time he makes the purchase contract, whether or not he has made payment, taken legal title or been registered on the books of the corporation as a shareholder. These economic benefits include dividends, stock splits, rights, warrants, scrip and all the other privileges of a shareholder, except voting power. Williston on Contracts, 3rd Ed. §953 (1964). For example, in Matter of Dynamics Corp. v. Abraham & Co., 4 Misc. 2d 50 (Sup. Ct., N.Y. Co. 1956), the actual date when stock was purchased through their brokers, and not the record date, was held to control the accrual of appraisal rights of dissenting shareholders.

Rule 237 of the New York Stock Exchange Rules restates the above principle that the buyer is entitled to receive all dividends, rights and privileges, except voting power, accruing upon securities purchased during the pendency of the contract. Rule 275 of the New York Stock Exchange mandates that a seller pay or deliver to the seller any distribution, including stock dividends, subscription rights and cash dividends, with respect to purchased securities where delivery is made too late to enable the buyer to obtain transfer in time to become a holder of record.

In Broderick v. Adamson (Grief), 270 N.Y. 260 (1936), the Court held that a buyer was entitled to receive from the seller the stipulated number of shares, together with the right to any benefits accruing on such shares, from the time when the contract of purchase and sale was made.

In Broderick v. Alexander (Kahn), 268 N.Y. 306 (1935), the New York Court of Appeals discussed the corresponding rights and obligations vesting in a purchaser of stock as of the contract date, regardless of the date of delivery of shares. The Court stated:

> "...'Seller and buyer occupy a quasi-trust relationship as long as the seller remains the holder of record and the buyer remains the actual owner of the stock.' Regardless of whether title to the stock of Leta M. Kahn passed from the seller of the stock prior to the delivery of the certificate, or even prior to transfer upon the books of the corporation, the seller by contract of present sale was bound to transfer, and the buyer was bound to accept, fifty shares of stock, together with rights to any benefit accruing upon the stock from the time the contract of sale was made. The contract of sale may not call for immediate delivery of the stock - even appropriation of specific stock to the contract may be postponed, yet the purchaser acquired by a contract of present sale a right to the benefits which may accrue upon the stock bought, and that right is, for convenience, called the 'beneficial ownership' of the stock.
>
> "The beneficial owner of the stock at the same time becomes subject to an obligation to indemnify the seller upon a liability which may flow from record ownership of the stock; for the 'duty to bear burdens is correlative to the right to take benefits'." (Citations omitted.) 268 N.Y. at 309.

In Appellant's brief herein, Abraham's counsel asserts that "the parties cannot be presumed to have had any intent other than to effect a transfer of ownership of the certificates as of the date of delivery." (Appellant's brief, p. 18) The fact that delivery of the Certificates was not completed until February 1973 in no way alters the fact that the sales here in issue took place on November 1, 1971.

The rule of law that a buyer of stock acquires ownership of purchased shares on the contract date, not the delivery date, was relied on by the Court in Tangorra v. Hagan Investing Corp., 38 App. Div. 2d 671 (App. Div. 4th Dep't 1971) in dismissing an action for rescission and negligence against a broker for failure to deliver purchased shares for three months, even though the shares had become worthless by the time of delivery. The Court held that even though plaintiff had not yet received the stock certificates, she owned the stock and had the power to sell it; thus, any loss sustained by her was the result of her own inaction. See also, Miller v. Witter & Co., 64 Misc. 2d 105 (Civ. Ct. N.Y. Co., 1970.)

Section 3(a)(13) of the Securities Exchange Act defines the term "purchase" to "include any contract to buy, purchase or otherwise acquire," and section 3(a)(14) defines the term "sale" to include "any contract to sell or otherwise dispose of." A contract to sell stock is defined as a sale regardless of the fact that an actual sale has not been completed or closed. See Leasco Data Processing Dequipment Corp. v. Maxwell, '73-'74 CCH Dec. ¶94,403 (S.D.N.Y. 1974).

Although Abraham has reversed its position, it previously conceded in its proof of claim herein that a sale transpired on the date of contract. Abraham stated: "(O)n November 1,

1971, for settlement November 9, 1971, Brukenfeld, Mitchell & Co., acting as agent, sold for the account of Abraham & Co., 606 Westinghouse Electric Interim Certificates in the over-the-counter market." (Emphasis added.) (A 91)

On November 1, 1971, contracts for the sale of Interim Certificates were entered into between Abraham and Appellees. On that date, Appellees acquired all incidents of beneficial ownership - including the right to any recovery against the escrow fund - and therefore, the right to participate in the Class Action Settlement Fund.

C. SPINGARN AND SATNICK-JAPHA ARE MEMBERS OF THE CLASS ENTITLED TO PARTICIPATE IN THE CLASS ACTION SETTLEMENT FUND.

On November 1, 1971 Appellees purchased Westinghouse Interim Certificates from Abraham, thus placing them clearly within the class herein. In support of the redefinition of the class from persons who owned Interim Certificates as of October 29, 1971 to those persons who owned Interim Certificates as of November 2, 1971, plaintiffs submitted to the District Court that:

> "As part of this Settlement, the Court is being asked to expand the classes so as to include persons who acquired Interim Certificates through November 2, 1971. This requested extension is due to the fact that even though Westinghouse made its claim against the escrow on October 29, 1971, the news did not become completely disseminated until

> November 2. The release was issued in Chicago late in the day on Friday, October 29. On Monday, November 1, there was some trading of Interim Certificates in New York, apparently at prices which reflect a lack of knowledge of the Westinghouse claim. Since Westinghouse's claim exceeded the value of the escrow, the claim effectively rendered the Interim Certificates worthless. Since plaintiffs are suing for the value of the Interim Certificates (plus interest and/or dividends) based upon the alleged misleading nature of the proxy statement, persons who sold Interim Certificates prior to November 2, 1971, under the aegis of the alleged misleading proxy statement, received substantial value for the Certificates based upon the expectation that Westinghouse would not assert a claim against the escrow. Therefore, it is questionable whether persons who sold Interim Certificates prior to November 2, 1971 suffered any damages. In fact, they were beneficiaries of the alleged nondisclosures. However, persons who held Interim Certificates on November 2, 1971 by which date the Certificates had clearly been rendered worthless, suffered damages. Consequently, the Settlement provides that only persons who held Interim Certificates on November 21, 1971 may participate in the Settlement. (A 42-43)

Clearly, Spingarn and Satnick-Japha fall squarely within the class definition.

The fact that Abraham may have suffered a loss does not give it any rights to share in the Settlement Fund. Spingarn and Satnick-Japha also suffered a loss. The Class Action Settlement is designed to compensate only those persons falling within the boundaries of the class definition. Other persons who suffered losses are not entitled to participate in the Settlement Fund in the class definition, Spingarn and Satnick-Japha are the parties entitled to share in this Class Action Settlement Fund.

CONCLUSION

As members of the class herein defined, Appellees suffered losses which the Class Action Settlement was specifically designed to redress. Appellees' beneficial ownership of the Interim Certificates as of November 1, 1971, is clear from the facts and from the applicable law. Whitman & Ransom, Esqs., and the District Court have both upheld the claims of Appellees to participate in the Class Action Settlement Fund.

For the above reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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Service of three (3) copies of

the within Brief is hereby admitted this

20th day of April, 1977

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